No. 14836

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ELMER G. COFFEY AND MRS. ELMER G. COFFEY, HUSBAND AND WIFE, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

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STATEMENT

This is an appeal by the United States from a judgment of the United States District Court for the Eastern District of Washington, Southern Division, imposing liability on the Government under the Federal Tort Claims Act, 28 U. S. C. 1346 (b), 2671 *et seq.* Appellee Elmer G. Coffey sustained injuries to his left hand when a metal object he was hammering exploded. The object had been found on private property in a rough area by two hunters more than a year before; they picked it up, carried it to appellee's home and gave it to him. After the accident the object was identified as a practice bomb signal, loaded with a blank shotgun shell, normally used by United States

military forces. Appellee's complaint, filed June 17, 1954, asserted that his injuries were caused "solely" by negligence of the Department of the Navy (R. 7–8). The Government's answer denied any act of negligence on the part of the United States and affirmatively alleged that appellee was himself guilty of negligence (R. 9–10).

The case went to trial in February 1955 before District Judge Sam M. Driver. There was no direct evidence at trial as to how the bombs came to the spot where they were found, and, in an oral opinion (R. 229–235) rendered after trial, the district judge stated, "[I]t is a rather puzzling thing how these practice bombs got there. * * * [B]ut for what it may be worth, my *guess* is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gulley * * *" (R. 230–231; emphasis added). In his Findings of Fact and Conclusions of Law (R. 10–15), this "guess" was transposed into a factual finding that at some time prior to 1951 the object had been dropped from some military aircraft. The finding that appellee's injuries were caused by employees of the United States is based upon the further assumption or inference that whatever aircraft dropped the object was operated by military personnel, and upon the additional assumption or inference that such personnel were acting within the scope of their employment at that time, and upon the further inference that they were acting negligently.

Judgment awarding damages to appellee in the sum of $8,740.60, plus interest and costs, was entered March

4, 1955 (R. 16).[1] A notice of appeal was filed May 2, 1955 (R. 18). This Court's jurisdiction rests on 28 U. S. C. 1291.

1. *The proceedings before the district court.*—The evidence introduced by both parties at trial may be summarized as follows:

a. *Events leading up to the accident.*—In 1950 Elmer G. Coffey, a 47-year-old sheep farmer and part time pharmacist, moved from Seattle to a farm located about 4½ miles west of Benton City, Washington (R. 54–5). About a mile from the Coffey sheep farm was another farm known as the Waggoner Ranch. Adjoining the Waggoner Ranch, and separated from it by a gulley, was the Livengood Ranch (R. 11). While some farming was done there, the area near the gulley was rough, rocky, and hilly terrain (R. 23).

In the fall of 1951, Oliver Osborne and Albert J. Osborne, brothers-in-law of Coffey and then guests at his home, went bird hunting in that area (R. 22–3). While walking in the gulley, at a point some 50 to 75 feet from a county road, and approximately 1½ to 2 miles from Coffey's farm, they discovered two metal objects partially covered with dirt (R. 22–4, 38–41). The objects, cylindrical in shape and each about 8 inches long and 2 to 3 inches in diameter (R. 12), were heavy and seemed to resemble pieces of lead conduit pipe (R. 39, 43–4).

[1] As originally entered, the judgment directed interest at the rate of six per cent per annum. This was contrary to the provisions of the Tort Claims Act which specifically limit interest to four percent. 28 U. S. C. 2411 (b). On April 5, 1955, an order was entered amending the judgment by changing the interest rate to four per cent (R. 17).

There appeared to be a hole or indentation at the end of each which was filled with dirt or corrosion (R. 47, 44–5). The Osbornes did not examine the objects closely, but did scratch their surface to see if they were lead (R. 23, 43). On determining that the metal was lead, they decided to take it home and give it to Coffey because they knew that he made use of lead in connection with his hobby of pouring and molding bullets (R. 23, 39).

The Osbornes testified that they knew they were on private property; in fact, the area from which they took the metal objects was enclosed by a fence, but they said they had received permission from the owners of the property to hunt on the ranches (R. 34–35, 53). No evidence was offered, however, that either Oliver Osborne or his brother Albert had ever been given permission to disturb anything which might be on the property or to remove and carry anything away from the premises.

Albert Osborne testified that he had worked in the locality during some of the years between 1942 and 1948, and that he knew that the Navy had used some of the general area for bombing ranges at that time. He was aware also that the Navy had posted "Keep Off" signs near the ranges. (R. 47–8, 52.) But he denied seeing any warnings about bombs during the years 1950–1952 (R. 48), and he testified that there were no signs in the area where these particular bombs were found (R. 24, 52). The Osbornes saw no fins on the objects, nor did they see any metal nearby to indicate any fin, so they did not recognize the objects to be bombs (R. 24–25), although in broad form they were similar to a bomb or

dud which they knew appellee Coffey kept in his home (R. 49). When found, the objects were 5 or 6 feet apart and there were no other like metal objects nearby (R. 33–4).

The Osbornes carried the objects to appellee's home and gave them to him. He "took it and threw it in the basement" (R. 55).

Appellee Coffey testified that his hobby was guns and the making of bullets, that he had handled firearms all of his life, and that he even kept a collection of live bullets (R. 145, 147). He also kept a 60 millimeter mortar shell in his home which still had enough explosive in it to cause considerable damage (R. 218–226). Appellee testified that on February 14, 1953—more than a year after the Osbornes had presented him with the objects (R. 12)—Emmet N. Frederick came to his home to visit him and to learn how to cast some bullets. They began casting with lead, but shortly decided to try some "higher velocity stuff." Appellee went down into his basement and brought out one of the objects the Osbornes had given him. He had examined it two or three times before and had decided that it was composition lead, harder than usual (R. 133, 94). It was encrusted with dirt and pebbles (R. 135). He testified that he was not familiar with bombs and did not believe the object was explosive or dangerous (R. 136). While he later heard that there had been warnings publicized about the possibility of bombs in the area, he never heard about it before the accident, and he denied even knowing that there had been a bombing range in the area (R. 148–9). He showed the object to Frederick, but

told him that it was dirty and would have to be cleaned off before putting it into the melting pot, saying that otherwise "you will have a small explosion" (R. 133–4).

Appellee began beating the object first with an iron pipe and then with a hammer (R. 94, 134–5). He threw it down and beat it for two or three minutes to knock the crust and dirt off the sides (R. 141). Then, seeing what appeared to be a hole going through the entire cylinder, he took a pin or punch and drove it into the hole about three inches, striking four "good and hard" blows with his hammer, when it exploded (R. 134–5, 141).[2]

b. *The nature of the bomb and its use by the military.* The objects which the Osbornes had found and had given to appellee were identified by ordnance specialists as parts of two 13 pound Mark A & N practice bombs (R. 63, 157). They are made of a soft zinc-alloy composition (R. 163) and are loaded with a cartridge resembling a blank shotgun shell, containing a black or colored powder. Their purpose is to create a spot, on landing, which can be observed and photographed from the air so as to check the effectiveness of the target practice (R. 164–5). They will not detonate under casual handling, as when

[2] Appellee sustained the loss of his left thumb, some permanent disability to his left index finger, and some related injuries to his left hand as set forth in Finding VI (R. 12). The district judge found that the injuries did not result in any direct pecuniary loss in his profession as a pharmacist, but that there would be pecuniary loss so far as his physical work as a farmer and sheep raiser is concerned, although not with regard to his managerial ability (R. 234–5).

dropped from 4 or 5 feet; they require an external force to set them off, thus, by pounding it or by dropping it from a plane (R. 165). The bombs have a thin metal tail fin molded on, which almost always tears off when the bomb is dropped from an altitude (R. 176).

While available to both the Army and the Navy for practice bombing from aircraft, this type of bomb is used only in horizontal bomb practice; when the bomb is dropped, the plane must be in horizontal flight and at a high altitude, *i. e.,* at about 6,000 feet (R. 157, 162). The bomb cannot be used in skip bombing or in dive bombing because, if it were, it would not explode. The bomb will detonate only when it lands on its nose, and that will not happen unless it is dropped from horizontal flight (R. 158). In skip and dive bombing, on the other hand, the plane itself is aimed at the target, and comes in at a sharp angle (R. 191). An entirely different type of bomb is used for dive bombing (R. 208–9).

During World War II years, the Navy had an air station in the area, known as the Pasco Naval Air Station. It was used for training aircraft carrier flyers. A practice bombing range was established in Benton County, located about ten miles from the place where the Osbornes found the two bombs (R. 188–190, 57). The bombing area was enclosed by barbed wire fencing and warning signs were posted at intervals of about 200 feet. At the time of the accident these signs were still there (R. 200). This Naval bombing range was used *only* for dive bombing and

367735—55——2

skip bombing (R. 58–9, 191–2). Applicable Naval Regulations specifically designated the range for that purpose alone (R. 198). Planes with bombs hanging on a bomb rack were not permitted to fly over populous areas (R. 194), and the Regulations prohibited the dropping of ordnance anywhere except in designated and approved areas (R. 198). No violation of this regulation was ever reported to Naval authorities (R. 199). The 13 pound practice bomb, such as the Osbornes found, was never used at the Naval Air Station at all (R. 192), nor was that type of bomb ever seen there (R. 205). For its dive and skip bombing practice, the Navy used a miniature bomb, smaller than the one with which appellee injured himself (R. 192). Such miniature bombs are made of cast iron and are not as smooth as the other (R. 208–209). None of the military services other than the Navy used the Benton County target area (R. 194–5). It is to be noted, moreover, that the runways at the Naval Air Station were only long enough for aircraft carrier type of planes and were too short to be used by bomber type aircraft (R. 193–4).

There was, however, an Army target area located north of Saddle Mountain, not in Benton County, which was used for horizontal bombing by the Army Air Force (R. 57–8, 195–6). This bombing range is located about 55 air miles from Benton City.[3] By agreement between the two services, the Navy confined its flight operations in the general area of Benton

[3] We are advised by the Department of the Army that the Army target range is located in Yakima and Kittitas Counties, approximately 55 miles northwest of Benton City.

County to under 6,000 feet, while the Army flew at altitudes above 6,000 feet (R. 195).

In more recent times, it was common knowledge in the Benton City community that bomb fragments could be found on the old Naval bombing range. James D. Dixon, a friend of appellee, testified that when he came to live nearby he was interested in getting lead and was told by friends to search around the range area; he did, and he found some bombs which he asserted were similar to the one which appellee detonated (R. 89–90, 87). He stated that many people go out into the old range and take bombs or pieces of bombs home, and that he had done so himself (R. 91–2). Floyd McKnight, who had rented part of the Livengood ranch to pasture his cattle and who also worked at the Waggoner ranch, testified that within an area of some 3 acres on the Livengood property he, from time to time, found what he estimated to be a total of 12 or 15 bombs almost all of which were in a broken or shattered condition (R. 102–4). He indicated their weight to be about five pounds each (R. 109). He did not believe them to be dangerous, and even sawed one in half with a hacksaw (R. 111). When he learned they were bombs, however, he buried them. But, at appellee's request, he later dug up some of the fragments and gave them to him. (R. 115–6, 121–2). These fragments (Plaintiff's Exhibits 2, 9, 10, and 11), were identified at trial as parts of the same type of bomb as the Osbornes had found (R. 67–71). An ordnance specialist, examining the smaller pieces (Pl. Exs. 9, 10, and 11), stated his opinion to be that

if they were found together within a 25 foot radius the bomb from which they came either had been dropped (and presumably shattered) there or had exploded there (R. 68–71). As to one of the larger parts of a bomb found by McKnight (Pl. Ex. 2), it was his opinion it had been dropped there from a considerable height (R. 68). But a second specialist suggested otherwise (R. 185–6). Another witness stated that if these objects were found scattered within an area of 3 or 4 acres, it would be consistent with their having been released from a bomber, either accidentally or deliberately (R. 226).

However, as to the particular bombs found by the Osbornes, the testimony was quite different. When one of them (Pl. Ex. 1) was examined by the ordnance specialist, he testified that he could not say whether that one had been dropped from an airplane; indeed, he could not even say that it had been dropped from a considerable height (R. 65, 64). Asked to explain certain marks on the object, he said they could have resulted either from having been dropped or from having been dragged across the ground (R. 65).

2. *The Government's motions to dismiss, and the proceedings at the close of trial.*

a. *The Government's motions to dismiss.*—At the conclusion of appellee's affirmative case the Government moved to dismiss, contending *inter alia* that the appellee had failed to establish any negligence upon the part of the Government and that the doctrine of *res ipsa loquitur* is not applicable in this situation (R. 151–4). The trial judge agreed that

appellee had failed to show negligence directly, stating to Government counsel (R. 152–3; emphasis added):

> *I will concede that they haven't shown directly any negligence;* they haven't proved that Pilot X got out of the area and dropped a bomb. It would only be by res ipsa loquitur that they could establish their case, so you needn't dwell on the question of direct negligence. *There hasn't been any proof of it.*

The judge, however, indicated he would not hear argument on the legal question then, preferring to have the Government put in its evidence. Accordingly, he denied the motion (R. 154).

At the conclusion of the trial, the Government's motion to dismiss was renewed (R. 227). But again it was denied (R. 229–235).

b. *Appellee's motion to amend the pleadings.*—After the taking of evidence was closed, and during the course of counsels' final arguments, appellee's counsel moved to amend his pleadings so as "to conform to the proof" (R. 228). The complaint had alleged that the asserted negligence was "solely" of employees of the Department of the Navy (R. 8). Appellee's motion after trial sought to include the Army within this allegation (R. 228). The Government opposed the motion, but the Court granted it (R. 228–9).

c. *The oral opinion and the findings of fact and conclusions of law.*—In his oral opinion rendered after trial, the district judge stated that "it is a rather puzzling thing how these practice bombs got there" (R. 230) and that, while it was possible that

the objects may have been brought to the gulley, or dropped by a hunter who found them too heavy to carry, "the only reasonable inference * * * is that [they] * * * got there by being dropped from a plane" (R. 229). Having thus determined (by inference) that they had been dropped from a plane, the judge then inferred the identity of the plane, stating, "in all probability they were dropped from a military plane" (R. 230). Then, specifically giving credence to the testimony that the Navy did not use this type of bomb in the area, he found that the bombs were not dropped by Naval pilots (R. 230). He noted, however, that there was testimony of an Army target range near Saddle Mountain for horizontal flight bombing. From this he inferred that the Army was in fact using this type of bomb, and went on to say that (R. 231; emphasis added):

> * * * *if* they [the Army planes] began their runs as far south as the Yakima River in approaching this area on Saddle Mountain—I am not inclined to speculate and I don't think it necessary for me to pin point the service that might be responsible here—but for what it may be worth, my *guess* is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gulley and one salvo hit down there and one of them didn't explode.

As to negligence, the trial judge held that since the Government had exclusive control of the bombs and of the plane in which they were carried, the doctrine of *res ipsa loquitur* applies—"the bombs could not get * * * on private property in a private field, away

from any military area or bombing range, without negligence of some sort on the part of the operator of the plane" (R. 230).

The trial judge stated that the issue of contributory negligence was a "much closer" and "much more difficult question" (R. 232, 231), but he concluded that none was present (R. 233). As to the Osbornes' taking the bombs off private property, the trial judge stated that while perhaps they had no right to do so, the objects were abandoned property (R. 232).

In his Findings of Fact, the trial judge specified that the United States military personnel had been negligent (a) in failing to mark the practice bombs with signs to warn persons of their dangerous qualities; (b) in dropping a bomb which was so constructed that its fin would readily become detached, so that it would then appear harmless and not look like a bomb; and (c) in dropping the bomb in an area outside an authorized practice range (R. 13–4). He found also that the negligence occurred while such military personnel were acting within the scope of their authority and in the line of active duty (R. 14).

Judgment against the United States in the total amount of $8,740.60 plus interest and costs was entered March 4, 1955 (R. 16). This appeal followed.

STATUTE INVOLVED

1. The relevant provisions of the Federal Tort Claims Act[4] are as follows:

[4] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judi-

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

SPECIFICATION OF ERRORS

1. The evidence is insufficient to support the District Court's findings of fact, conclusions as to negligence, and judgment. Plaintiffs failed to meet their burden of proof, and the District Court erred in not granting the Government's motions to dismiss made

cial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671–2680, effective September 1, 1948 (62 Stat. 869, 992).

at the conclusion of plaintiffs' affirmative case and at the conclusion of all the testimony.

2. The District Court erred in admitting evidence concerning the finding of bombs other than the one which caused plaintiff's injury.

3. The District Court erred in holding that there was negligence of the Government which was the proximate cause of plaintiff's injury, and in failing to hold that the conduct of the plaintiff E. G. Coffey and of the Osbornes was the efficient intervening cause of the accident.

4. The District Court erred in applying the doctrine of *res ipsa loquitur*.

5. The District Court erred in holding that the United States is liable under the Federal Tort Claims Act (a) for failure to mark practice bombs concerning their dangerous qualities; (b) for failure to post warnings concerning dangerous objects on property not owned or controlled by it; and (c) for the manner in which it constructs practice bombs.

6. The District Court's findings relating to negligence and the absence of contributory negligence are clearly erroneous.

7. The District Court erred in granting judgment for the plaintiff.

367735—55——3

ARGUMENT

I

The Appellee failed to establish the factual elements which are conditions precedent to recovery under the Tort Claims Act

A. The District Court's findings that the bombs were placed on private property by Federal employees, that these Federal employees were acting within the scope of their employment, and that they were acting negligently, are based entirely upon conjecture and a pyramiding of inference on inference

1. Congress did not, through the Tort Claims Act, undertake to insure the safety of the person or property of our citizens. Rather, the overall purpose of the Act was to waive governmental immunity from suit for tort so as to permit those who suffered damage by the wrongful conduct of federal employees to have the same legal remedy against the United States which they would have against a private person in like circumstances. When that remedy is available, the claimant must establish his cause of action in the same manner, subject to the same requirements of sufficiency of proof, as in the case of private litigation. Far from relaxing the normal requirements of legal proof, the statute expressly imposes a number of conditions precedent to the right of recovery and even excludes a wide variety of wrongs from its coverage. See 28 U. S. C. 1346 (b), 2674, 2680.

Section 1346 (b) prescribes the basic conditions under which liability may be imposed. Under that Section, the United States accepted liability for the negligent or wrongful act or omission "of any employee of the Government while acting within the scope of his office or employment, under circum-

stances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." As this Court recently observed in *United States* v. *Dooley,* — F. 2d —, Slip Op. p. 2 (C. A. 9, Oct. 17, 1955), each of the elements stated in Section 1346 (b) is a separate and necessary precondition to the imposition of liability, and there can be no recovery in the absence of specific findings establishing every one of them.

Obviously, the basic precondition to liability is that "* * * [T]he statute requires a negligent act" (*Dalehite* v. *United States,* 346 U. S. 15, 45). The mere fact that the claimant has been injured by a shell or an explosive which unquestionably is of military origin, will not, of itself, create liability; without proof of a negligent act there can be no recovery. *United States* v. *Inmon,* 205 F. 2d 681 (C. A. 5) (plaintiff injured by a dynamite cap found on private property which had formerly been an Army base); *Ford* v. *United States,* 200 F. 2d 272 (C. A. 10) (plaintiff injured by a booby trap on Army property frequented by the public); *Schmidt* v. *United States,* 179 F. 2d 724 (C. A. 10) (claimants injured by a shell found on a former target range); *Denney* v. *United States,* 185 F. 2d 108 (C. A. 10) (same); *Rolon* v. *United States,* 119 F. Supp. 432 (D. P. R.) (plaintiff injured by portion of a shell found abandoned on a public road near an Army base).

Thus, in the instant case, the fact that the bomb with which appellee injured himself was military in origin is not sufficient, standing alone, to warrant re-

covery. As these cases clearly demonstrate, liability cannot be posited on the fact that the instrumentality causing the injury—even though it be an inherently dangerous one—is, or at one time was, *owned* by the Government. For, the fact of ownership does not necessarily connote negligence or wrongful conduct. See in addition to the cases cited above, *Bowden* v. *United States,* 200 F. 2d 176, 177 (C. A. 4); *In re Texas City Disaster Litigation,* 197 F. 2d 771, 776 (C. A. 5), aff'd, 346 U. S. 15, 45; *Curtis* v. *United States,* 117 F. Supp. 912 (N. D. N. Y.). Nor is it enough for the appellee to show that the United States engaged in bombing practice in or near the locale of his residence, because the Tort Claims Act does not permit recovery on a theory of nuisance, or the conduct of an extra-hazardous activity, or on any other theory of liability without fault. *Dalehite* v. *United States, supra,* 346 U. S. at 44–5; *United States* v. *Ure,* 225 F. 2d 709, 711 (C. A. 9); *United States* v. *Inmon, supra,* 205 F. 2d at 684; *Heale* v. *United States,* 207 F. 2d 414 (C. A. 3); *Harris* v. *United States,* 205 F. 2d 765, 767 (C. A. 10). In short, unless the claimant can establish negligent or wrongful conduct, his suit must fail.

But in addition to establishing negligent conduct, the claimant must also show that the negligent act was that of a federal employee, and the word "employee" is given a specific definition in the statute. 28 U. S. C. 2671. Thus, there can be no recovery, even though negligence is proven, if the actor is not acting in his capacity as an employee of the United States although he actually is employed by the United

States. *Fries* v. *United States,* 170 F. 2d 726 (C. A. 6) (U. S. employee "loaned" to a local state agency). And, of course, given the status of federal employment plus federal ownership of the instrumentality plus negligence, there still cannot be liability if the negligence occurs while the employee is outside the scope of his employment. *King* v. *United States,* 178 F. 2d 320 (C. A. 5) (Army pilot negligent while joy riding in Army plane). Finally, despite the presence of negligent conduct of a federal employee while acting within the scope of his employment, there can be no liability unless there is a proximate relationship between that negligence and the injured party. Cf. *Schmidt* v. *United States,* 179 F. 2d 724 (C. A. 10).

2. The burden of establishing each one of these elements requisite to the imposition of liability under the Tort Claims Act rests, of course, upon the claimant. *United States* v. *Inmon, supra,* 205 F. 2d at 684; *Bowden* v. *United States,* 200 F. 2d 176, 177 (C. A. 4). His burden is to show that the negligence occurred "at the time *and in respect to the very transaction* out of which the injury arose." *United States* v. *Eleazer,* 177 F. 2d 914, 916 (C. A. 4), certiorari denied, 339 U. S. 903 (emphasis by the court). And, clearly, his burden is to prove such negligence—as well as the other prerequisites—by something more than mere conjecture, or speculation, or sheer guesswork. *Bowden* v. *United States, supra.* Indeed, the quantum of legal proof necessary to establish an actionable cause against the United States under the Tort Claims Act, is certainly no less than, or different from, that needed to establish liability for negligence on the part

of a private individual. 28 U. S. C. 2674. To permit the claimant to establish his cause on a chain of presumptions or on a series of inferences, such as was successfully accomplished at the trial below, is to impose liability on the basis of conjecture and speculation rather than on legal proof. See *Bowden* v. *United States, supra,* 200 F. 2d at 177; *Rolon* v. *United States,* 119 F. Supp. 432 (D. P. R.); *Curtis* v. *United States,* 117 F. Supp. 912, 913 (N. D. N. Y.).

A close analysis of the record made at trial, and of the trial judge's opinion, discloses that the direct proof established but one primary fact, *viz.,* that a Government bomb was found on private property located approximately fifty-five miles from an Army target range where, years before, such bombs were used. From that fact, by the process of pyramiding inference on inference, the trial judge made findings concerning each of the elements necessary to an actionable cause. In this way liability was imposed by crossing from the area of legal proof into the realm of speculation and guesswork.

To reach the conclusion that liability be imposed, the trial judge had to reason as follows (R. 229–231):

a. The objects picked up and taken away by the Osbornes were identified as being bombs of military origin. This fact was established by direct proof.

b. Another person, McKnight, found other bombs somewhere in the general vicinity, imbedded 3 or 4 inches in the ground. From this, it was *inferred* that the McKnight bombs were dropped from a plane, and because the McKnight bombs were dropped from a

plane it was *inferred* that the Osborne bombs also were dropped from a plane.[5]

c. From the inferred fact that the bombs were dropped from some plane, it is further *inferred* that the plane was a U. S. military plane (*i. e.,* owned by the United States, as opposed to other possibilities such as being owned or used by a State National Guard unit).

d. From the inferred fact that it was a military plane, and having ruled out the possibility of its being a Navy plane (R. 230), and because the Army had a target range over fifty miles away at Saddle Mountain, it is assumed or *inferred* that the plane was an Army bomber.

e. From the inferred fact that it was an Army bomber, it is assumed or *inferred* that the Government had exclusive control over the plane and the bombs which it is assumed the plane carried.

f. From the inferred fact that the assumed plane was under exclusive governmental control, it is *inferred*

[5] But note that appellee's own witness, an ordnance specialist, examining one of the Osborne bombs testified that he could *not* say that that bomb had been dropped from a plane or from any considerable height (R. 65, 64). He suggested that it might have been dragged to the spot where it was found (R. 65). The trial judge himself acknowledged the possibility that they "may have been brought there, dropped by a hunter who found them too heavy to carry" (R. 229), but decided that was not likely because some of the *McKnight* bombs were imbedded. Whether the Osborne bombs had any relationship at all to the McKnight bombs, whether they were brought or dropped there at the same time, is also a matter of inference. The Osbornes said they did not see any other bombs or pieces of metal in the area where they picked up the two objects (R. 25, 33).

that the plane was piloted by federal employees, *i. e.*, Army personnel.

g. From the inferred fact that the plane was piloted by Army personnel, it is *inferred* that they were then acting within the scope of employment.[6]

h. By reason of all of the inferred facts, it is then assumed or *inferred* that the bombs could not have gotten where they were found "without negligence of some sort" (R. 230). Or, as the trial judge put it, "for what it may be worth, my *guess* is that some Army bombers didn't get rid of their practice bombs over the target area and dropped them in this gully * * *" (R. 231, emphasis added).

This series of assumptions—pyramiding inference on inference—is patently short of meeting the minimum standards of legal proof. It is nothing but guesswork. And the trial judge himself virtually acknowledged it to be such. Strangely enough, while the trial judge expressed his inclination not to speculate, at the very same time he proffered his *guess* as to how the bombs came to be where they were found (R. 231). Equally strange—especially in view of his determination that appellee had established his case—is his frank remark in his opinion that "it is a rather puzzling thing how these practice bombs got there" (R. 230). It was appellee's burden to establish how they got there and to establish negligence in putting

[6] Even airplanes have been taken or stolen by military personnel for purposes of a joyride, having no relationship whatever to any official military mission or to any mission within the scope of employment. See *King* v. *United States*, 178 F. 2d 320 (C. A. 5).

them there. If, after all the evidence was in, the trier of the case was still puzzled and unable to perceive, except through guesswork, how the bombs got there, manifestly, appellee failed to meet his burden of proof.

It is an elementary and basic principle that "negligence cannot be established by inference upon inference, or presumption upon presumption. * * * Neither can a finding of negligence rest on mere speculation or conjecture." *Gas Service Co.* v. *Hunt,* 183 F. 2d 417, 420 (C. A. 10); and see *Bowden* v. *United States,* 200 F. 2d 176, 177 (C. A. 4); *Abbott* v. *Railway Express Agency,* 108 F. 2d 671, 672 (C. A. 4); *Rolon* v. *United States,* 119 F. Supp. 432, 434 (D. P. R.); *Curtis* v. *United States,* 117 F. Supp. 912, 913 (N. D. N. Y.); 20 Am. Jur., p. 168. The words of the Eighth Circuit in *Westland Oil Co.* v. *Firestone Tire & Rubber Co.,* 143 F. 2d 326, 330, are apt (emphasis added):

> While circumstantial evidence is competent to prove negligence or the cause of an injury, the circumstances must be such as to take the case out of the realm of mere conjecture. An inference of negligence must be based on a logical relation and connection between the proven facts or circumstances and the conclusion sought to be adduced from them. The circumstances must themselves be proved and cannot be presumed. * * * *A presumption must be based upon facts proven by direct evidence and can not be based upon nor inferred from another presumption.*

The Supreme Court long ago declared the same rule. *United States* v. *Ross,* 92 U. S. 281, 284; *Manning* v.

Insurance Co., 100 U. S. 693, 698; *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 477. And not only is this the rule in the federal courts but it is also rigidly adhered to in the State of Washington, where the present case arose. *Neel* v. *Henne,* 30 Wash. 2d 24, 37, 190 P. 2d 775; *Brucker* v. *Matsen,* 18 Wash. 2d 375, 382, 139 P. 2d 276; *Prentice Etc. Co.* v. *United Pac. Ins. Co.,* 5 Wash. 2d 144, 164, 106 P. 2d 314; *Johnson* v. *Western Express Co.,* 107 Wash. 339, 344–5, 181 P. 693. As stated in the *Johnson* case, *supra:*

> It is a well established rule that a presumption can be legally indulged only when the facts from which the presumption arises are proved by direct evidence, and that one presumption cannot be deduced from another. To hold that a fact inferred or presumed at once becomes an established fact, for the purpose of serving as a base for a further inference or presumption, would be to spin out the chain of presumptions into the regions of the barest conjecture.

In the instant case the trial judge flagrantly violated this fundamental rule. The crucial findings—that federal employees placed the bombs where they were found, that they were acting within the scope of their employment, and even that they acted negligently when they did so—are the result of a chain of assumptions and inferences stemming from other assumptions and inferences instead of from direct evidence. See *supra,* pp. 20–22. These findings, accordingly, have no legal evidentiary basis in the record. They must be regarded as without sufficient support in the evidence and as clearly erroneous. The trial judge erred in not granting the Government's motion

to dismiss made at the conclusion of appellee's affirmative case (R. 151–4). He erred again in not granting the motion when it was renewed at the conclusion of the trial (R. 227). If the rule against piling inference upon inference is a valid one—and the overwhelming number of cases applying the rule demonstrate its validity—the judgment below must be reversed.[7]

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[7] While we have found no case in which a trial judge has gone to such extremes as did the court below to fill an evidentiary vacuum so as to impose liability under the Tort Claims Act, reference should be made to a few cases in which the trial court was, in effect, requested to do so but, correctly, refused. Thus, in *Bowden* v. *United States*, 200 F. 2d 176 (C. A. 4), plaintiff left a herd of sheep on an island which was taken over by the Navy and another federal agency. Returning a few years later, he discovered that the sheep somehow had been destroyed. In a suit against the Government, his evidence showed that part of the island had been sprayed with DDT on several occasions. But the court observed that it was also possible that the sheep may have been killed by federal employees occupying the island, or by their dogs. The court refused to impose liability, stating that the plaintiff must prove negligence by something more than conjecture and speculation.

The plaintiffs in *Rolon* v. *United States*, 119 F. Supp. 432 (D. P. R.), were injured by an explosion of a portion of a mortar shell that one of them had picked up on a public road where it had apparently been abandoned. There was an Army base in the immediate vicinity. The court stated that even assuming the shell belonged to the Army, plaintiffs' inability to establish that it got there through the negligence of some federal employee while acting within the scope of his employment precluded recovery. The court refused to fill the evidentiary gap by indulging in "a chain or series of inferences."

In *Curtis* v. *United States*, 117 F. Supp. 912, 913 (N. D. N. Y.), plaintiff sought damages for the loss of mink sustained when two military aircraft negligently flew low over his mink farm. The court held that even though plaintiff had estab-

B. The doctrine of *res ipsa loquitur* is not applicable in this case

1. Having determined *by inference* that the bombs came from some plane, that the plane was probably a military one, that it was piloted by military personnel, and that it was under the exclusive control of the Government, the court below then ruled that the doctrine of *res ipsa loquitur* may be invoked in these circumstances so as to establish negligence (R. 229–230). This ruling was manifest error because appellee wholly failed to lay a sufficient foundation for invocation of that doctrine. Actually, this case should be governed by the familiar precept that negligence must be proved, and never will be presumed; that the mere fact that an accident has occurred, or that an injury was sustained, is not evidence of negligence.

That precept is, of course, subject to the qualification that the fact of negligence can be proved by circumstantial evidence. The doctrine of *res ipsa loquitur,*

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lished that the planes were of a military type and were flown negligently, he had failed to establish both that they were flown by federal employees and that such employees were acting within the scope of their employment. To assume these two facts "would be to pile inference upon inference. * * * The dividing line between logical inference and pure speculation is not easily drawn, but in the Court's opinion it would be pure speculation to find in the absence of a single bit of evidence that the planes in question were operated by United States military personnel upon a regular training mission, when it is just as probable that they may have been operated by National Guard personnel, not in federal service although using federal equipment. Under such circumstances the defendant would not be liable. * * * The circumstances are such that the Court would like to reimburse the plaintiff for the damages caused, but generosity is not the function of the court in determining litigation."

however, is simply an application of the circumstantial evidence rule to a negligence case. Through that doctrine the law recognizes that an accident may happen under such circumstances "that the occurrence is of itself sufficient to establish prima facie the fact of negligence on the part of the defendant" (*Morner* v. *Union Pacific R. Co.,* 31 Wash. 2d 282, 196 P. 2d 744, 748–9). The doctrine means no more than "that the facts of the occurrence warrant the *inference* of negligence, not that they compel such an inference" (*Sweeney* v. *Erving,* 228 U. S. 233, 240; emphasis added). But it is always important to bear in mind that *res ipsa loquitur* is only a rule of circumstantial evidence and, as such, it is subject to the maxim that, "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed." *Chic. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 477. "In order to prove a fact by circumstances there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown and not left to rest in conjecture * * *." *Prentice Packing and Storage Co.* v. *United Pacific Ins. Co.,* 5 Wash. 2d 144, 106 P. 2d 314, 322. And see *supra,* pp. 23–24.

At the very outset, then, it is apparent that the doctrine of *res ipsa loquitur* cannot be applied in this case because to do so would be to contravene the rule, which we have already discussed, against piling inference on inference. Here, substantially all of the circumstances surrounding the incident—the very circumstances which are said to bring the inference doctrine of negligence

(*i. e.,* the *res ipsa loquitur* theory) into play—are themselves the product of inferences. See *supra,* pp. 20–22. In that situation application of the doctrine is not permissible.

2. The circumstances which a plaintiff must prove before the doctrine can be invoked under Washington law are set forth in the leading case of *Morner* v. *Union Pacific R. Co.,* 31 Wash. 2d 282, 196 P. 2d 744. Among the elements he must establish are these: (1) "The wrongdoer must be identified. The circumstances of an accident may permit an inference * * * that someone has been negligent, but not that any particular person rather than another has been negligent" (*ibid.,* 196 P. 2d at 751); (2) the defendant must have had "sole and exclusive control of the agency or instrumentality which actually caused the injury" (*id.* at 750); and (3) the accident must be such as in the ordinary course of events would not occur without someone being negligent (*id.* at 748).

We have already noted that appellee offered no direct evidence, and the record is devoid of any, concerning the identity of the person who placed the bombs, which the Osbornes found, in the gulley. The conclusion that such person was a federal employee acting within the scope of his employment was arrived at by piling inference on inference. The same is true of the trial judge's speculative conclusion that the bombs were dropped from a military or Army bomber. Even when the other requisites of the doctrine are present the Washington courts hold that the "one charged under the doctrine of *res ipsa loquitur* is not to be put to his proof unless there is

some showing of cause—careless construction, lack of inspection, or misuser. The cause of the accident—the offending instrumentality—must be identified before one charged is put to answer." *McClellan* v. *Schwartz,* 97 Wash. 417, 166 P. 783, 784.[8]

Appellee similarly failed to establish exclusive control of the instrumentality in the Government. When found, the bombs were on private property not far from a public road. The area was many miles from any government reservation. There was no direct evidence whatever to indicate who had possession or control of the bombs before they were placed there. In *Obertoni* v. *Boston & M. R. R.,* 186 Mass. 481, 71 N. E. 980, a boy was injured by a railroad torpedo found on defendant's grade crossing. Reversing a judgment for the plaintiff, the Supreme Judicial Court said (71 N. E. 981):

> The burden is on the plaintiff to prove that it came there by act of the defendant or of its employees in the course of its business. We are of the opinion that, from its presence on the planking, the jury were not warranted in inferring that it was there through an act of an employee, done in the course of the defendant's business.

To the same effect are *Birnbaum* v. *Philadelphia & R. Ry. Co.,* 249 Penn. 238, 94 A. 925, and *Sward* v. *Megan,* 284 Mich. 421, 279 N. W. 886. It is significant,

[8] In that case, plaintiff was assisting defendant's servant in hauling on a rope attached to an overhead block and tackle when the latter broke off and struck plaintiff. The court held that in the absence of evidence, other than inferences, that the accident occurred through any defect in the block and tackle or its rigging, a nonsuit was proper.

moreover, that if the Government did in fact have exclusive control over the bombs at one time, that control had long been relinquished before the accident. The bombs were found on private property which was fenced in. When found they were in the possession and control of the owner of that property. When picked up and carried away from the premises they were in the control of the Osbornes. The Osbornes gave them to appellee who put them in his basement, and for over a year before the accident they were wholly in his possession and control.

Even if a plaintiff does establish exclusive control of the instrumentality in the hands of the defendant, he has the additional burden of showing that "the accident could not have happened without negligence." *Nopson* v. *City of Seattle,* 33 Wash. 2d 772, 207 P. 2d 674; *Firebaugh* v. *Seattle Electric Co.,* 40 Wash. 658, 82 P. 995, 996. Cf. *Gardner* v. *Seymour,* 27 Wash. 2d 802, 180 P. 2d 564, 571: "* * * while the inferences allowed by the rule or doctrine of res ipsa loquitur constitute such proof [of negligence], it is only where the circumstances leave no room for a different presumption that the maxim applies." In *Wilson* v. *Northern Pacific Ry. Co.,* 44 Wash. 2d 122, 265 P. 2d 815, 819, the court declared that, "If the existing state of affairs, however dangerous, might, according to the ordinary experience of mankind, have been due to other causes than negligence for which the defendant was responsible, then it was for the plaintiff to exclude the operation of those causes by the greater weight of the evidence." In the present case, appellee made no attempt through testimony or

other evidence to show that only by virtue of someone's negligence could the bombs have dropped in an unauthorized area. Absent such evidence, the trial judge purported to make this a subject of judicial notice. But the manner in which bombs are attached to or released from a plane is not such a matter of common knowledge that it can be presumed that negligence is the only permissible or reasonable explanation. Other feasible and logical explanations, in which negligence plays no part, are equally apparent—they may have fallen from a defective bomb-rack; they may have shaken loose in turbulent weather; they may have been released purely through accident; etc. In the absence of evidentiary material or of general experience warranting judicial notice that negligence is the one reasonable explanation of the event, the doctrine may not be invoked.

C. The district court's findings that there was negligence in failing to post warning signs concerning the bombs and in the manner of their manufacture were erroneous as a matter of law

In addition to having found that it was the Government which negligently dropped the bombs on private property, the district court's Findings state that the Government was also negligent (a) in failing to post signs warning of the dangers of the bombs, and (b) in constructing the bombs in such manner that their tail fin would become detached so that they then would not appear to be bombs (R. 13–14). Necessarily, liability under both of these findings is premised on the preliminary findings that the bombs were placed on the property by federal employees acting within the scope of their employment. If we

are correct in our earlier discussion that the latter findings of fact are not warranted by the record, then the two additional conclusions of negligence as a basis for liability must also fall. But even when viewed without reference to the preliminary findings, both conclusions are erroneous as a matter of law.

1. Liability for negligence is based upon the violation of a duty owed to the person injured. If there is no duty, or if that person is outside the class to whom the duty is owed, no action is maintainable. Appellee, we submit, utterly failed to establish facts giving rise to any duty to post warning signs. There is no evidence whatsoever in the record indicating that the United States knew, or reasonably should have known, of the presence of the bombs on the private property, and the trial court made no such finding. The Osbornes, who found the bombs, had permission of the owner of the property to hunt on the premises. They were merely licensees. Even the owner of property owes no duty to warn a bare licensee of the presence of any dangerous condition or object on his premises unless he has *actual* knowledge of some concealed danger and realizes that the licensee will not discover it. A licensee has no right to demand that the land be made safe for his reception; he has no right to expect the owner to inspect the premises to discover dangerous objects; he must assume the risk and look out for himself. *Prosser on Torts* (2d Ed., 1955), p. 445. The only duty that an owner or occupier of land has to a licensee on his premises is not to wilfully or wantonly injure him. *McNamara* v. *Hall,* 38 Wash. 2d 864, 233 P. 2d 852.

If the owner or occupant of the property, who has possession and control of the premises as well as the opportunity to inspect them, owes no duty to warn a licensee of a dangerous object on the premises, certainly the United States, who had no knowledge of the presence of danger, and no legal right to enter or inspect or mark up the property, has no such duty. And if the duty is not owed to a licensee, surely it is not owed to a donee of the licensee, which was the status of appellee.

Affirmative obligations to warn of the dangers on land flow from the fact that the one in possession is in a position of exclusive control and therefore is best able to prevent harm to others. See F. H. Bohlen, *The Moral Duty to Aid Others as the Basis of Tort Liability,* 56 U. of Pa. L. Rev. 217, 233–4. Obviously, if employees of the United States had sought to inspect or to post signs on the private property, as the court below held they should have done, they would have committed trespass. Where there are dangers on land, even though created by a third party, whatever duty there may be to remove them or to warn about them rests solely with the present owner or occupant. *Virginian Ry.* v. *Mullens,* 271 U. S. 220, 227; *United States* v. *Inmon,* 205 F. 2d 681 (C. A. 5). The courts will look no further back than the last wrongdoer "especially when he has complete and intelligent control of the consequences of the earlier wrongful act." *Kilmer* v. *White,* 254 N. Y 64, 171 N. E. 908, 910; *Clifford* v. *Atlantic Cotton Mills,* 146 Mass. 47, 15 N. E. 84, 87.

2. The determination that there was negligence in the manner in which the bombs were manufactured or constructed appears on its face patently erroneous. This finding relates to the design of the bomb. We know of no case which has ever held that the United States owes any duty to anyone to design or construct its munitions in such manner that they will readily appear to be a dangerous object. It hardly seems necessary to suggest that the prime consideration in the design and construction of munitions is to accomplish the purpose for which they are to be used, whether it be in actual combat or in training for combat. It is, we submit, not a tort for the United States to construct a bomb in such a way that its tail fin will drop off. In any event, no actionable claim is cognizable under the Tort Claims Act for asserted negligence in the planning or design or construction of bombs because that kind of claim clearly is excluded under the discretionary function exclusion of the Act, 28 U. S. C. 2680 (a). Cf. *Dalehite* v. *United States,* 346 U. S. 15.

II

Appellee failed to establish that the conduct of federal employees was the proximate cause of his injuries

Assuming *arguendo* that the bombs were dropped from a military plane which was piloted by military personnel while acting within the scope of their employment, and assuming further that the bombs were dropped through some negligent conduct in the plane, there was, we submit, no proximate causal relationship between such conduct and appellee's injuries. For, if there was negligent conduct, it was not negli-

gence toward appellee. Moreover, there were entirely unforeseeable and independent intervening acts of third persons after the force set in motion by the Government came to rest. Additionally, the appellee himself was not free of contributory negligence.

1. To obtain recovery in a negligence suit, the claimant must show that he was within the class of persons to whom defendant owed a duty of due care. While a defendant's conduct may constitute negligence as to some persons—that is, when the actor's conduct creates a foreseeable risk of harm to a particular class of persons—that same conduct cannot be regarded as negligence toward another person who is injured but who is outside the foreseeable orbit of danger. This is the familiar rule of *Palsgraf* v. *Long Island R. Co.,* 248 N. Y. 339, 162 N. E. 99, where the court also observed that a party may not recover "as the vicarious beneficiary of a breach of duty to another" (162 N. E. at 100).[9] Stated another way, there is no duty to an unforeseeable plaintiff. See *Restatement of Torts,* § 281, Comment c.

Applying this principle to the present case, it is apparent that the class of persons toward whom there is a foreseeable risk of harm in dropping the bombs from a plane includes those whom the bombs might strike and those in the immediate vicinity who might be hurt when the bombs hit the ground and explode. But the orbit of foreseeable danger can hardly be said to include persons like appellee who moved to the area

[9] The *Palsgraf* case has been referred to approvingly by the Supreme Court of Washington in *Sitarek* v. *Montgomery*, 32 Wash. 2d 794, 203 P. 2d 1062, 1066.

some considerable period—perhaps years—later, and who himself was never at or near the spot where the bombs were dropped. It taxes credibility to suppose that a reasonable person could foresee, first, that the bombs would not explode, second, that the bombs would remain undiscovered for some years, third, that some casual licensee would enter another person's premises and, upon finding the objects, commit a tort (conversion) by picking them up and carrying them away, fourth, that he would make a gift of them to still another person who resides miles away, fifth, that such other person would leave the strange objects around his house for over a year during which period he would examine them several times but would fail to learn or try to find out what they are, and sixth, that such person would forcefully beat the objects with heavy hammer blows preparatory to tossing them into a melting pot. Appellee's position, both in respect to time and distance from the event, is clearly too remote to be within the class of persons who reasonably could be anticipated as being within the recognizable zone of danger created by the dropping of the bombs.

2. What has been stated above underscores another point: that the supposed negligent conduct was not the proximate cause of the injury. The usual definition of proximate cause, and the one accepted in Washington, is "that cause which, in a natural and continuous sequence, *unbroken by any new, independent cause,* produces the event, and without which that event would not have occurred." *Cook* v. *Seidenverg,* 36 Wash. 2d 256, 217 P. 2d 799, 803 (emphasis added).

Here, the record demonstrates that the accident which caused appellee's injuries was not part of a natural and continuous sequence beginning with the dropping of the bombs. If the Government was negligent, that negligence was insulated by the superseding and independent events set out above (*supra,* pp. 35–6). The tortious removal of the bombs by the Osbornes, their gift of the bombs to appellee, the unusually long period of time they lay in appellee's basement, the unexpected and violent treatment given them by appellee, all of which, while in the realm of possibility, clearly were not within the range of probability or reasonable expectation. In such circumstances there is no proximate cause. Cf. *Schmidt* v. *United States,* 179 F. 2d 724 (C. A. 10); *Sitarek* v. *Montgomery, supra.*

3. We believe, finally, that a careful review of the record, when measured by the standards of Rule 52 (a), F. R. C. P., will disclose that the district court's finding that appellee was not contributorily negligent is clearly erroneous. See *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395. Appellee was not an infant. At the age of 47 when the accident happened, he admitted that he had been handling firearms and ammunition all of his life. The use of guns and the making of bullets at home were his hobby. He kept a collection of live bullets in his home. R. 145, 147. He even kept a mortar shell around his house which still contained enough powder in it to cause considerable harm. R. 218–226. While he claimed to be unfamiliar with bombs, considering

that he was a person of wide experience in munitions and lived in a community where it was common knowledge that the Navy had engaged in practice bombing on target ranges nearby, he was certainly not exercising normal or reasonable caution when he violently beat and hammered an unfamiliar metal object which he himself feared would *explode* if it were thrown into the melting pot in its raw state (R. 133–4). If appellee is to look to anyone for redress it would seem that he should look to his brothers-in-law, the Osbornes, who saw fit to carry off the strange objects from someone else's property and gave them to him.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed with directions to dismiss the complaint and to enter judgment for the United States.

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